

No. 14354

In the United States Court of Appeals
for the Ninth Circuit

JAMES H. SEWELL, DOING BUSINESS UNDER THE FICTITIOUS
FIRM NAME AND STYLE OF BURNS CUBOID COMPANY, PETI-
TIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO REVIEW AN ORDER TO CEASE AND DESIST

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

I. STATEMENT OF THE CASE

This case is before the Court on a petition for review and to set aside an order to cease and desist (I. R. 183-186), issued by the Federal Trade Commission, respondent, pursuant to a complaint charging petitioner¹ with engaging in unfair and deceptive acts and practices in interstate commerce in violation of the Federal Trade Commission Act.²

The proceeding below conforms to all the requirements of, and was in full and complete compliance with, the applicable provisions of the Federal Trade Commission Act, the Adminis-

¹The complaint was issued against James H. Sewell and George Pepperdine, copartners trading as Burns Cuboid Company. During the course of the hearings, it developed that Sewell had purchased the interest of his partner. However, the order was issued against both respondents below and has now become final as to George Pepperdine. Sewell is the only petitioner before this Court, and in the interest of simplicity this brief is written as though petitioner was the only party respondent below.

²The pertinent provisions of the Act are set forth, *post*, pp. 25-26.

trative Procedure Act, and the applicable rules of the Commission's Rules of Practice then in effect.

The complaint, briefly summarized (I. R. 2-11), alleged that petitioner, trading as Burns Cuboid Company, was engaged in the sale and distribution in interstate commerce of a device, as "device" is defined in the Federal Trade Commission Act, generally designated "Cuboids," "Burns Cuboids," or "Cuboids Foot Balancer," and sometimes referred to as "Doggies"; that to induce the purchase of his said device petitioner disseminated and caused to be disseminated, by means of the United States mails and in interstate commerce by various other means, false advertisements purporting to be descriptive of the therapeutic and orthopedic value of his device. The representations made in these advertisements were set out in the complaint (Par. 3, complaint; I. R. 4-5). The complaint charged that such representations were misleading in material respects and constituted "false advertisements" as defined in the Federal Trade Commission Act (52 Stat. 116; 15 U. S. C. 55).

The complaint then alleged that the use by petitioner of the false statements and representations "has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous belief that such representations are true, thereby inducing the purchase of the said devices," and concluded that by these acts and practices petitioner had violated the Federal Trade Commission Act.

In his answer petitioner admitted being engaged in selling in interstate commerce the device described in the complaint and the dissemination of the advertisements as alleged in the complaint. He pleaded, however, that certain of those advertisements had been discontinued and denied all other material allegations of the complaint.

After issue was thus joined, the Commission duly designated one of its hearing examiners to hold hearings. Upon the completion of the hearings the examiner filed his initial decision with the Commission containing his findings as to the facts, conclusions, and order to cease and desist. Thereafter petitioner timely filed his notice of appeal from the initial decision of the hearing examiner.

On the 12th day of March 1954, the Commission made two separate but related decisions: (1) an order denying petitioner's appeal (I. R. 150-169); and (2) the decision of the Commission containing findings as to the facts, conclusions, and order to cease and desist (I. R. 170-186).

Except insofar as petitioner contends that the findings relating to falsity of his representations are not based upon substantial evidence, there is no dispute as to the facts. We shall therefore summarize the pertinent facts, with annotations to the record, that form the basis of the Commission's findings and conclusions and which support the order to cease and desist.

The Commission found that petitioner had disseminated since 1947 and is now disseminating, by the United States mails and by various other means in interstate commerce, advertisements containing the representations set forth in the complaint.³

The Commission found that through the use of those statements and representations petitioner has represented "directly and by implication, that the use of [his] device will assist the wearer to obtain body balance and foot balance; that it will relieve aches and pains regardless of the cause thereof; that more normal foot action will result from the use of said device; that [his] device will assure the user better posture, poise and balance and that it will assist in improving the stance; that housework will be rendered less tiresome by wearing Cuboids; that the use of [the] device will afford increased foot health and comfort and beneficially assist in the distribution of body weight; that upon the correct position of the cuboid bone depends the relative position of every other bone in the foot, and that if these bones are maladjusted as to position the use of such device will serve or assist to normalize their position; and that calloused feet will be relieved by the use of Cuboids" ⁴ (I. R. 174-175).

³ Petitioner's brief arbitrarily breaks down the advertising statements in issue, with the result that some of them have lost their meaning (Pet. Br., pp. 4-5).

⁴ Said findings of the Commission are not contested by petitioner before this Court, either in its Statement of Points (I. R. 201-204), or in its Brief on petition to this Court, under "Questions Involved" and "Specifications of Error," or elsewhere in said Brief.

The Commission found further that "through use of the term 'Foot Balancers' in the designation and description of [his] device, [petitioner] additionally represent[ed] and indicate[d] that the use of [his] device will assist the wearer to balance the feet or body" (I. R. 175). (See footnote 4, *supra*.)

The Commission found that body balance in the foot and the maintenance of equilibrium depend primarily upon a tripod made up of the calcaneous (heel bone) and the first and fifth metatarsal heads, upon which a person stands, and the ligaments, tendons, muscles, and nerve supplies to those muscles; that most of the body weight thrust from the leg is received and distributed through the medial group of bones constituting the main arch of the foot, known as the longitudinal arch (I. R. 176). The cuboid bone is not included in the enumeration of said medial group of bones.

The Commission found that the human foot is constructed to adequately bear the weight of the body without any further aid to nature; that before correct treatment can be decided upon for foot trouble which requires realignment or readjustment of the foot bones, an accurate history must be obtained, including an expert diagnosis of the conditions causing the foot disorders. A layman cannot make such diagnosis. Treatment which may be beneficial for one foot may not be appropriate for the other foot of the same individual (I. R. 176-177).

The Commission found that petitioner's device does not grasp or grip sufficiently on the sides of the heel of the foot to correct any rolling tendencies of the heel or to significantly support the back of the heel; that the device would not be instrumental in throwing weight to the outer border of the foot, even in a case where such a modification might be desired, one reason for which is that the lateral elevations on each side of the device tend to balance each other out (I. R. 177-178).

The Commission found that petitioner's device would not substantially raise the frontal area of the foot in relationship to the heel bone and that such elevation as might be afforded might not be required in a particular case; that the device cannot affect the ligaments, the bony structures, or the neuromuscular mechanism entering into the balance of the foot; that

the elevations do not support or serve as the foundation for the cuboid bone (I. R. 178-179).

The Commission further found that foot disorders or foot troubles generally will not be benefited by wearing petitioner's device; that while foot troubles conceivably might be corrected or relieved through the relief of pressure in the metatarsal area if the device happened to fit correctly and the particular person happened to have a foot which was adapted to the device, such beneficial instances would be happenstances and merely occasional or rare; that, on the other hand, the use of petitioner's device might aggravate the condition which it was being used to correct (I. R. 179).

The Commission concluded that there was no reasonable probability that those wearing petitioner's shoe insert secured through fitting and recommendation of petitioner's representatives or sales personnel would receive the benefits which petitioner's representations promised would be afforded (I. R. 179-180).

The Commission further found that "the use of Cuboids will not assist the wearer to attain body balance or foot balance, or assist beneficially in the distribution of body weight. Such use will not be generally effective in affording the user better posture or poise or an improvement in stance nor will more normal or improved foot action result therefrom. The wearing of [petitioner's] device will not afford or increase general foot health. Although the wearing of Cuboids may in some instances aid strained, tired feet, [petitioner's] device cannot be relied upon to give comfort to users who have foot troubles or to correct or relieve conditions caused by misfitted shoes. [Petitioner's] device is not an effective treatment for ordinary foot aches and pains and has no therapeutic value in the treatment of aching or painful feet. Cuboids will not be generally effective in treating or relieving calloused foot conditions and the use of Cuboids cannot be relied upon to lessen the fatigue caused by housework or other physical effort" (I. R. 180.)

The Commission further found that "the wearing of Cuboids will not favorably influence the position, action or function of the Cuboid Bone, nor will such device realign, readjust or

normalize or improve the position of other bones of the feet" (I. R. 181).

Upon the basis of those findings of fact the Commission concluded (I. R. 183) that petitioner had violated the Federal Trade Commission Act, and entered its order (I. R. 183-186) directing petitioner, in the offering for sale, sale, or distribution of the device "Cuboids," or any device of substantially similar construction or composition, under whatever name sold, to cease and desist from representing directly or by implication:

(a) That the wearing of [petitioner's] device will assist in balancing the feet or body.

(b) That [petitioner's] device possesses therapeutic value for aching or painful feet.

(c) That the wearing of [petitioner's] device will enable the user to achieve better posture or poise or will improve the stance.

(d) That the wearing of [petitioner's] device will result in more normal foot action or improved foot action or foot health.

(e) That the wearing of [petitioner's] device will afford increased comfort for the feet or decrease the fatigue resulting from housework or other physical efforts except to the extent that [petitioner's] device may in instances reduce or relieve the discomfort associated with strained or tired feet.

(f) That the wearing of [petitioner's] device will have beneficial effect upon the distribution of body weight.

(g) That the wearing of [petitioner's] device will in any way aid the Cuboid Bone or its position or stability with respect to other bones of the feet or will serve to readjust, realign, normalize or improve the position of the bones of the feet.

(h) That said device possesses therapeutic value in the treatment of calloused feet.

* * * * *

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the

purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in Paragraph 1 hereof.

Thereafter a petition for review was timely filed by James H. Sewell, who also filed specifications of points relied upon as required by the rules of this Court. Some of these points are not developed in petitioner's brief and therefore are abandoned *Donnelley v. United States*, 276 U. S. 505, 511 (1928); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 369 (1927).

II. QUESTIONS PRESENTED

We believe it would be of benefit to the Court to briefly outline the procedure covering matters of this nature in effect at the time this case was before the Commission. Under the Commission's Rules of Practice the hearing examiner was required to make and file his initial decision within thirty days from the date of the order closing the case before him. His decision would become the decision of the Commission thirty days after service upon petitioner unless prior thereto (1) an appeal was filed under the provisions of Rule XXIII, (2) the Commission by order stayed the effective date of the initial decision, or (3) the Commission on its own initiative placed the case on its review calendar.

The hearing examiner made his initial decision containing findings as to the facts, conclusions, and order to cease and desist on December 31, 1952 (I. R. 131-143). After service of the initial decision upon him petitioner complied with the provisions of Rule XXIII of the Commission's Rules of Practice by filing on March 10, 1953, an appeal to the Commission from the initial decision of the hearing examiner. Thereafter, on March 12, 1954, the Commission made two separate but related decisions. One was interlocutory, the other final. The interlocutory decision was a ruling by the Commission on petitioner's appeal from the initial decision of the trial examiner, which included rulings by the Commission on exceptions taken to alleged errors in procedure, conduct, and rulings of the examiner (I. R. 150-169). The other was the final decision of the Com-

mission on the merits, and included the Commission's findings as to the facts, conclusions, and order, entered by the Commission in lieu of the initial decision of the examiner (I. R. 170-186).

The final decision of the Commission on the merits is the only decision which, under the Federal Trade Commission Act, is subject to review by a court of appeals. This Court, of course, under its review powers can examine the interlocutory decisions rendered by the Commission to determine whether the Commission's rulings on alleged errors committed by the examiner are of such a nature as to materially affect the validity of the findings as to the facts and the order to cease and desist entered by the Commission.

In his brief petitioner ignores the above procedure and fails to distinguish between the initial decision of the examiner (I. R. 131-143), the interlocutory decision by the Commission on petitioner's appeal from the initial decision of the examiner (I. R. 150-169), and the final determination of this case on its merits by the Commission (I. R. 170-186).

Under the heading "Specifications of Error" petitioner lists some 23 alleged errors made by the examiner and some 7 alleged errors made by the Commission (Br., pp. 8-11). An examination of these errors discloses that each of them falls into one or more of the following classifications: (a) errors made by the examiner rather than errors made by the Commission in its rulings on the alleged errors made by the examiner,⁵ (b) errors not raised before the Commission by petitioner on his appeal from the initial decision of the examiner, (c) errors which are not included by petitioner in his statement of points relied upon filed in this Court, and (d) errors which are not stated with clarity and particularity, as required by subsection 2 (d) of Rule 18 of the Rules of Practice of this Court.

Subjecting petitioner's specifications of error to the above classifications, the following results are obtained: (a) of the 23 errors alleged to have been committed by the examiner only 5 were raised before the Commission by petitioner in his appeal from the initial decision of the examiner, error Nos. 1, 2,

⁵ Errors made by the examiner are not, as such, subject to review by a court of appeals.

3, 4, and 5, and, of these only error Nos. 2, 4, and 5 were included by petitioner in his statement of points relied upon filed in this Court, and none of these is stated with the clarity and particularity required by Rule 18-2 (d) of this Court; (b) of the 7 errors alleged to have been committed by the Commission, error Nos. 1, 2, 3, 4, and 7 were not included in the statement of points relied upon, filed in this Court by petitioner, and error Nos. 3, 4, 5, 6, and 7 were not stated with the clarity and particularity required by subsection 2 (d) of Rule 18 of this Court's Rules of Practice.

One of the applicable rules of practice of the Commission at the time of the hearing below required that Petitioner's appeal brief contain "exceptions to any prejudicial error in procedure, including conduct or ruling of the trial examiner" (Rule XXIII C. (3)) and that "no matter not included in the appeal brief may thereafter be presented to the Commission, in oral argument or otherwise" (Rule XXIII D.). These provisions of this rule were designed to make applicable to procedure before the Commission a policy that the courts of appeals had followed in their review of administrative action—the policy of exhausting administrative remedy before the court would act.

Ordinarily an appellate court does not give consideration to issues which petitioners have not raised below. *Hormel v. Helvering*, 312 U. S. 552, 556 (1941). One of the reasons for this is that failure to raise the issues below deprives the court of the benefit and assistance of a decision by the triers of fact. *Helvering v. Tex-Penn Co.*, 300 U. S. 481, 498 (1937). For as the Supreme Court said in *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 36-37 (1952):

We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative

decisions unless the administrative body has not only erred but has erred against objections made at the time appropriate under its practice.⁶

In addition to the above decision of the courts and the applicable rule of the Commission, one of the rules of practice of this Court has a very definite bearing on whether an issue is properly before the court. This Court has deemed it important to require a petitioner seeking a review of an order of an administrative agency to "file with the clerk a concise statement of the points on which he intends to rely" (Rule 17 (6)). This Court has enforced this rule by refusing to consider arguments in a petitioner's brief on points not included in the statement of points relied upon. *State Farm Mutual Auto Insurance Co. v. Porter*, 186 F. 2d 834, 845 (C. A. 9, 1950); *Refrigeration Engineering, Inc. v. York Corporation*, 168 F. 2d 896, 899 (C. A. 9, 1948), cert. denied 335 U. S. 859 (1948).⁷

We therefore respectfully submit that due to the fact that the alleged errors set forth in petitioner's brief under "Specifications of Error" were either (a) not raised before the Commission, or (b) were not included by petitioner in the statement of points relied upon, or (c) were not stated with the clarity and particularity required by the applicable rule of this Court, petitioner has not properly raised and presented any question or issue in this matter under his petition for review. This Court could very well, and properly so, dismiss the petition for review without further consideration.

In his brief petitioner attempts to develop the following questions:

1. Are the Commission's findings supported by substantial evidence?
2. Are the Commission's findings inconsistent?

⁶ To the same effect, see *Unemployment Compensation Commission of Alaska v. Aragon*, 329 U. S. 143, 155 (1946); *Adams v. Mills*, 286 U. S. 397, 416-417 (1932); *United States ex rel. Beck v. Neelly*, 202 F. 2d 221, 224 (C. A. 7, 1953), cert. denied 345 U. S. 997 (1953); *Transamerican Freight Lines v. United States*, 51 Fed. Supp. 405, 412 (D. C. Del., 1943). (Consideration of alleged error not raised before entire Interstate Commerce Commission would permit applicant "to ambush the Commission.")

⁷ To the same effect, see *Pennsylvania Railroad Co. v. Public Utilities Commission of Ohio*, 298 U. S. 170, 177 (1936); *Cohen v. United States*, 142 F. 2d 861, 863 (C. A. 8, 1944).

3. Did the hearing examiner commit prejudicial and reversible error by reason of various rulings?

4. Was petitioner afforded a fair trial?

Even though, for one or more of the above reasons, these questions are not properly before this Court, the remaining portions of this brief will be in reply to petitioner's argument under those headings.

III. ARGUMENT

Preliminary statement

It is too well settled to require argument that the Commission's findings as to the facts, if supported by substantial evidence, are conclusive. The statute so provides, and this Court has often so held.⁸ This well-settled rule applies with as much force to findings with respect to which there is a conflict in expert testimony, medical or otherwise, as it does to other findings.⁹ It also applies where there is conflict between experts who had never used the product involved and experts who had,¹⁰ and applies where there is conflict between expert testimony and testimony of lay witnesses who have used the product,¹¹ for it is well settled that the weight and credibility of the testimony are for the triers of the facts to determine.¹²

⁸ Federal Trade Commission Act, Sec. 5 (c) ; 52 Stat. 112-113 ; 15 U. S. C. Sec. 45 (c) ; *Howe v. Federal Trade Commission*, 148 F. 2d 561, 562 (C. A. 9, 1945), cert. denied, 326 U. S. 741 (1945) ; *American Medicinal Products v. Federal Trade Commission*, 136 F. 2d 426, 427 (C. A. 9, 1943) ; *Lane v. Federal Trade Commission*, 130 F. 2d 48, 50 (C. A. 9, 1942) ; *Alberty v. Federal Trade Commission*, 118 F. 2d 669, 670 (C. A. 9, 1941), cert. denied 314 U. S. 630 (1941).

⁹ *Alberty v. Federal Trade Commission*, 118 F. 2d 669, 670 (C. A. 9, 1941), cert. denied 314 U. S. 630 (1941).

¹⁰ *John J. Fulton Co. v. Federal Trade Commission*, 130 F. 2d 85, 86 (C. A. 9, 1942), cert. denied 317 U. S. 679 (1942) ; *Bristol-Myers Co. v. Federal Trade Commission*, 185 F. 2d 58, 62 (C. A. 4, 1950) ; *J. E. Todd, Inc. v. Federal Trade Commission*, 145 F. 2d 858 (C. A. D. C., 1944) ; *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. A. 2, 1939), cert. denied 308 U. S. 616 (1939).

¹¹ *Vacu-Matic Carburetor Co. v. Federal Trade Commission*, 157 F. 2d 711, 713 (C. A. 7, 1946), cert. denied 331 U. S. 806 (1947) ; *Iricin v. Federal Trade Commission*, 143 F. 2d 316, 323-324 (C. A. 8, 1944).

¹² *United States v. Johnson*, 319 U. S. 503, 519 (1943). See also *Leach v. Carlile*, 258 U. S. 138, 139-140 (1922).

The Federal Trade Commission Act expressly prohibits the dissemination of false advertisements intended or likely to induce the purchase of any "device," and it empowers the Commission to determine whether such advertisements are true or false.¹³ The Commission would be rendered powerless, and the statute meaningless, if the existence of a conflict in testimony as to the falsity of advertisements of a "device" precluded a finding that they were untrue, for the court may well judicially notice that it is not difficult to obtain "expert testimony" and "lay testimony" in support of claims made for any proprietary nostrum or device.

We are not here concerned with "mere matters of opinion upon subjects which are incapable of proof as to their falsity." *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 104 (1902). We are dealing instead with the question of the therapeutic value of a "device" to be worn in the shoes, a matter "susceptible of demonstration and proof,"¹⁴ and four well-qualified medical experts¹⁵ testified that petitioner's device would not effect the results claimed for it. That being true, the Commission was not bound to accept as sound the opinions of petitioner's experts or his lay witnesses,¹⁶ and the fact that they testified contrary to the experts offered by the Commission "cannot enable petitioner to contend successfully that there was no substantial evidence to support the Commission's findings." *Justin Haynes & Co. v. Federal Trade Commission*, 105 F. 2d 988, 989 (C. A. 2, 1939), cert. denied 308 U. S. 616 (1939). As the court said in *Aronberg v. Federal Trade Commission*, 132 F. 2d 165, 170 (C. A. 7, 1942):

True, the Commission's evidence was zealously controverted by petitioner. But the triers of the facts were in a position to weigh the testimony and the credibility

¹³ Federal Trade Commission Act, Secs. 5, 12, 15; 52 Stat. 111, 114, 116; 15 U. S. C., Secs. 45, 52, 55.

¹⁴ Cf. *Farley v. Heininger*, 105 F. 2d 79, 84 (C. A. D. C., 1939), cert. denied 308 U. S. 587 (1939).

¹⁵ A summary of the qualifications of these experts appears in the appendix, post, pp. 26-28.

¹⁶ Cf. *Helvering v. National Grocery Co.*, 304 U. S. 282, 295 (1938).

of the witnesses. In view of substantial evidence to support the findings and our lack of authority to pass upon credibility or weight of evidence, they must be upheld.

Petitioner does not question those well-established principles. He does contend that the Commission's findings as to the facts are not supported by substantial evidence. Unless petitioner points to the specific finding which is not so supported, his contention raises no issue. The Commission's findings are presumed to be supported by "substantial evidence." *Federal Trade Commission v. A. McLean & Son*, 84 F. 2d 910, 911 (C. A. 7, 1936). This Court cannot be "compelled to search the record for undesignated error claimed upon an omnibus assertion" that the findings are unwarranted. *North Whittier Heights Citrus Ass'n v. National Labor Relations Board*, 109 F. 2d 76, 83 (C. A. 9, 1940), cert. denied 310 U. S. 632 (1940).

Petitioner admits that on direct examination three of the expert medical witnesses who testified in support of the complaint testified that his representations as to the benefit to be obtained from using his product were false (Br., pp. 29-30), but claims that that testimony "must fall before the analytical, detailed statements given by them on cross-examination" (Br., p. 29). Petitioner attempts to argue this point solely by reproduction of portions of the cross-examination of these doctors (Br., pp. 31-53) without explaining how or in what way such cross-examination destroys their direct testimony that his representations were false.

In addition to the foregoing generalization, petitioner has specifically attacked only three of the Commission's findings. These are the findings as to the effect of the use of his device on "balance," "callouses," and "ordinary foot aches and pains."

In view of the above, our argument under the question of whether the Commission's findings are supported by substantial evidence will be limited to the cross-examination question and those findings which petitioner specifically points to in his brief.

A. The Commission's findings as to the facts are supported by substantial evidence

1. *Testimony of the expert witnesses reproduced by petitioner in fact support the findings of the Commission*

The testimony relating to possible benefits of the device (Pet. Br., pp. 31-53) strengthens and supports the Commission's finding that foot disorders or foot troubles generally will not be benefited by wearing Burns Cuboids; that the only way foot troubles could be corrected or relieved by respondent's device would be through the relief of pressure in the metatarsal area, but only in occasional or rare instances where Cuboids might accidentally serve beneficially to change the area of pressure; but that on the other hand the use of respondent's device might aggravate the condition which it was being used to correct (I. R. 179).

This finding of the Commission is further supported by the fact that Dr. Engh testified that no foot trouble would be benefited by Cuboids except if by accident a support might fit the foot of a particular patient who happened to need such support in the metatarsal area (II. R. 20-21); that foot discomforts caused by misfitting shoes could not be corrected or relieved by using Cuboids unless by chance some pressure of the metatarsal area in a particular individual's foot might be corrected or relieved, but then only to a slight extent (II. R. 27); that discomfort might occasionally be relieved where a particular part of the metatarsal arch has some pressure removed from it, but this is not to be expected in the average case of foot trouble (II. R. 33); but that instead of the slight relief in the metatarsal area that might in such rare cases be achieved, the device might aggravate the condition (II. R. 61); and Dr. Masterson's testimony that in an occasional case, through happy circumstances and where there happened to be an exact fit, there might be some relief (II. R. 68-69); that in a rare case, if there happened to be a need for balance in the metatarsal area and if the need for balance should be determined by a person well trained and versed in foot pathology, not a shoe salesman, the device might help (II. R. 72-73).

The testimony II. R. 83-85 (Pet. Br., pp. 40-42) supports the Commission's finding that one reason why the device can-

not throw the weight to the outer border of the foot is that both sides of the device are raised and there is the tendency for the lateral elevations to balance each other out (I. R. 178).

Testimony in petitioner's brief, pp. 42-44, indicates the witness' opinion as to the insignificant function of the cuboid bone.

None of the remaining portions of testimony reproduced lends any support to petitioner's contention.

2. *Petitioner's device is not an effective treatment for ordinary foot aches and pains and has no therapeutic value in the treatment of aching or painful feet*

Dr. Engh testified that the device would be ineffective in the treatment or remedy of foot troubles generally (II. R. 29, 32), would have no effect on ordinary foot aches and pains, and would not exert any influence on the delicate nerve centers or arteries, nor would it relieve pressure therefrom (II. R. 31-32), or from the most sensitive parts of the foot (II. R. 29).¹⁷

Dr. Lewin, in rebuttal of witnesses produced by petitioner, testified that the device would furnish no mechanical aid to pains caused by foot trouble (IV. R. 843).

Petitioner's contention here is based on the testimony of lay witnesses that they had been benefited by using petitioner's product and that the Commission had ignored this testimony in making its findings of fact.

This contention has to do with the credibility and weight of the testimony, and it is well settled that this is for the Commission to determine (see text and cases cited *supra*, p. 11-13), and where there is expert testimony that petitioner's product has no therapeutic value in the treatment of any foot aches and pains, or in the treatment of aching feet, the Commission was not bound by the testimony of petitioner's lay witnesses.

3. *Petitioner's device will not be generally effective in treating or relieving calloused foot conditions*

Drs. Engh and Masterson testified that Burns Cuboids could not be relied upon to relieve calloused foot conditions (II. R. 29, 31, 73, 76). Dr. Masterson testified that callouses in the metatarsal area of the foot caused by high heels could not be

¹⁷ Dr. Masterson testified to the same effect (II. R. 73, 75-77), as did Dr. Mosiman (II. R. 108, 114, 116-118).

relieved by Burns Cuboids (II. R. 101). Dr. Mosiman testified to the same effect (II. R. 114, 116, 140).

The first portion of testimony reproduced by petitioner (Pet. Br., pp. 59-60) reveals that Dr. Engh was limiting himself to the rare instances where the elevation in the metatarsal area of the device might happen to strike behind the area that is being depressed, in which case there might be some relief (II. R. 51a-51b); that the device will not tend to remove pressure from the most sensitive parts of the foot (II. R. 29), except by accident (II. R. 20-21, 39); that even in such instances the device might aggravate the situation (II. R. 61).

The next portion of reproduction is from the testimony of Dr. Masterson (Pet. Br., p. 60; II. R. 68-69). Dr. Masterson explains he is talking of an occasional case where through a happy circumstance of an exact fit the device in question might help. He further testified:

Well, if it happens to fit correctly and the particular person happened to have a foot which was adapted to this device, then the position of this metatarsal pad might happily hit the right spot, but that certainly would be asking for a lot of coincidences to occur, which we cannot ask for, as a rule (II. R. 83).

Petitioner's reference to Dr. Mosiman's general testimony as to the causes of callouses and the various treatments used to relieve pressure from calloused areas (Pet. Br., pp. 60-61) does not lend support to petitioner's contentions. Dr. Mosiman stated that supports are prescribed and applied in combinations, depending entirely upon the particular patient's foot, at varied points under the sole of the foot (II. R. 132-133). The doctor explained that in placing supports to relieve pressure, an area of $\frac{1}{8}$ inch can make a great deal of difference and that left feet vary from right feet by as much as half a size; hence Cuboids, which are sold in identical pairs, could not help both feet even if one foot might, in a particular case, be aided (II. R. 141).

The testimony of Drs. Hiss and Garner, witnesses for petitioner, that the forepart of the Cuboid device will relieve pressure and treat callouses in much the same manner as a Thomas

Bar (Pet. Br., p. 61) was absolutely rebutted by Dr. Philip Lewin (IV. R. 846, 848).

Petitioner's attempt to credit the Cuboid device with the attributes of the Jones Bar and the Lewin Rubber Metatarsal Crescent (Pet. Br., pp. 61-62) is completely rebutted by Dr. Lewin's testimony that his Rubber Metatarsal Crescent is a modification of the Jones Bar (IV. R. 936), whereas the Burns Cuboid is absolutely dissimilar (IV. R. 847).

In Dr. Lewin's testimony referred to at page 61 of petitioner's brief, he specified that the various elevations he uses are always prescribed individually or in combinations on the basis of individual needs (Pet. Br., p. 65; IV. R. 939-940) as the various pads or elevations required vary from patient to patient, both in combinations of pads to be used and in relative sizes or thicknesses (IV. R. 939-950).

4. Petitioner's device will not assist the wearer to attain body balance or foot balance, or assist beneficially in the distribution of body weight

The expert witnesses in support of the complaint testified that nature has designed the human foot to fulfill the function of weight bearing without outside assistance, a more stable equilibrium is not required (II. R. 32, 77, 118); that wearing the device would be of no assistance in attaining body or foot balance (II. R. 21, 22, 27, 69, 70, 72-73, 108, 113); that one of the reasons Cuboids will not serve or help to balance the foot is because it cannot possibly affect the ligaments, the bony structures, or the neuromuscular mechanism which enters into balance of the foot (II. R. 24-25, 48); that the device in question will not tend to distribute weight or weight bearing to the most appropriate places of the foot for weight bearing (II. R. 29-30, 74); that the cuboid bone is relatively unimportant in body balance and weight distribution (II. R. 22-23, 26, 70, 86, 110, 111); that in walking the foot does not tend to roll to either side, but tends to go straight ahead (II. R. 86); that the device in question will not adapt itself to the shape of the foot, but that the contour reflects the natural wear of leather in the shoe (II. R. 92, 99-100; IV. R. 864-865); that the ordinary or average American shoe on a normal foot requires no device to prevent rotation of the heel bone; that the normal

American shoe does not have an unnatural surface for the foot to rest on, does conform to the anatomy of the foot and is made for normal foot functions, and said shoes do not hinder the proper distribution of body weight (IV. R. 862-863); and that Burns Cuboids will not overcome and correct the consequences of improper shoes (II. R. 58; IV. R. 867) will not help the heel in weight distribution, will not help keep the heel from rolling or wobbling (IV. R. 842-843), and will not provide a balanced foundation in the shank of the shoe (IV. R. 845).

Dr. Philip Lewin additionally testified that the device in question would not correct feet that are off center and restore them to normal position, would not restore the weight-bearing line to its normal position, would not balance or affect the balance of the human body, would not help balance the foot or affect foot balance, would not aid in balancing the heel, would not throw the weight or keep the body weight balanced on the outer side of the foot, would not keep the foot from rolling toward the inner side, would not cause the heel to roll to the outer side, and would not aid in the balancing of the properly distributed body weight (IV. R. 842-845).

Petitioner attempts to escape the effect of the above testimony by explaining the meaning he places upon the word "balance" when used in his advertisements and attempts to support or clarify this meaning by a demonstration during the hearing. He placed rubber erasers on either side of a rounded glass paperweight to prove that they would prevent the glass paperweight from rolling. Since "words mean what people understand them to mean," *Benton Announcements v. Federal Trade Commission*, 130 F. 2d 254, 255 (C. A. 2, 1942), we submit it is wholly immaterial what petitioner understands the word "balance" to mean. The use of a rounded glass paperweight scotched on either side by two rubber erasers in an effort to demonstrate the actual operation of the human foot in walking is far removed from the realities of the case, and Dr. Engh so testified (II. R. 49-51a).

We therefore respectfully submit that petitioner's contention that the findings as to the facts made by the Commission are not supported by substantial evidence is devoid of merit.

B. The Commission's findings are consistent

On page 55 of his brief petitioner sets forth subsection (b) of Paragraph Ten of the Commission's findings (I. R. 182-183) and lifts one section from Paragraph Eight of the findings (I. R. 180) and contends that the one is inconsistent with the other. This contention is without substance or foundation.

In his appeal to the Commission from the initial decision of the examiner, petitioner raised this same issue. The Commission ruled on this as follows:

* * * It appears from the record that in some instances, just as in the case of changing from one shoe to another, the placing of an insert in a shoe may temporarily relieve fatigue, and it is equally clear that chronic discomfort from strained feet may be caused by something which respondents' product may be of no value in correcting. Irrespective of such value as respondents' device in instances may have in reducing or relieving lack of comfort associated with strained or tired feet, the greater weight of the evidence clearly establishes that it has no therapeutic value or value from an orthopedic standpoint for relieving aching or painful feet. No conflict is presented, therefore, as to the rulings in question and this exception is being denied (I. R. 155).

and made the following finding as to the facts:

Although the wearing of Cuboids may in some instances aid strained, tired feet, respondent's device cannot be relied upon to give comfort to users who have foot troubles or to correct or relieve conditions caused by misfitted shoes. Respondent's device is not an effective treatment for ordinary foot aches and pains and has no therapeutic value in the treatment of aching or painful feet (I. R. 180).

It is clear from the above that the Commission has not found that respondent's device is an effective treatment for strained, tired feet or that it has therapeutic value in the treatment of strained, tired feet.

Petitioner also contends (Br., pp. 73-74) that the Commission's finding that since both sides of the device are raised "there is the tendency for these lateral elevations to balance one another out" (I. R. 178) is inconsistent with the finding that "the use of Cuboids will not assist the wearer to attain body balance or foot balance, or assist beneficially in the distribution of body weight" (I. R. 180). There is no more merit to this than there is to the alleged inconsistency just above discussed.

The Commission found that the equal lifts on each side of the device would balance each other out, and neither lift would have any effect on body weight or distribution. The Commission was not finding that the device had any balancing effect, but was finding that it had no such effect because each elevation was counteracted or "balanced out" by the other. This finding of the Commission, as well as its choice of language, is substantiated by the testimony of Dr. Masterson (I. R. 83-85).

C. Alleged errors of the hearing examiner¹⁸

1. *Refusal to admit the patent into evidence was not error*

A patent does not authorize the patentee to misrepresent his product, regardless of the nature of representations carried into the letters-patent. And petitioner's contention that it was error to refuse to admit petitioner's patent in evidence is without merit. A short reply, if any is necessary, is found in *Decker v. Federal Trade Commission*, 176 F. 2d 461 (C. A. D. C., 1949) cert. denied, 338 U. S. 878 (1949)¹⁹ where the Court stated:

It has long been settled that a patentee receives nothing from the law he did not have before, and that the only effect of his patent is to restrain others from manufacturing, using or selling that which he has in-

¹⁸ The errors discussed under this heading, although not properly raised before the Court, were raised before the Commission.

¹⁹ And see cases cited therein. See, also *Federal Trade Commission v. Winsted Hosiery Company*, 258 U. S. 483, 494 (1922); *Irwin v. Federal Trade Commission*, 143 F. 2d 316, 325 (C. A. 8, 1944); *Charles of the Ritz Distributors Corporation v. Federal Trade Commission*, 143 F. 2d 676, 679 (C. A. 2, 1944) to the effect that the registration of a trademark or trade name is no defense to its use to deceive the public.

vented. *Motion Pictures Patents Co. v. Universal Film Manufacturing Co.*, *supra*, and cases cited. Before the patent grant the inventor had the right to sell the product of his invention and to advertise the same, but not the right to misrepresent it. Now, after the patent grant, petitioners, the present owners of the patent, have the right to sell the article and to advertise it, but not the right to misrepresent it. In short, the letters-patent do not cover advertising (at p. 463).

2. Refusal to admit the prescriptions into evidence was not error

Petitioner contends that the examiner committed error in refusing to admit into evidence certain prescriptions of doctors prescribing the use of the device. On appeal to the Commission from the initial decision of the examiner, petitioner raised and argued this issue. The Commission sustained the examiner. Petitioner states that he offered these prescriptions "to refute the testimony elicited by the attorney in support of the Complaint that the medical profession all over the United States would have nothing to do with the product" (Pet. Br., p. 14).

There is no merit to the contention for three reasons. First, these exhibits were pure hearsay evidence; second, there is no such testimony in the record as that sought to be rebutted; and, third, petitioner was not prejudiced by the action of the examiner inasmuch as verbal testimony, offered by petitioner, coextensive with the offer of proof was admitted in evidence. *McKee v. Jamestown Baking Co.*, 198 F. 2d 551, 556 (C. A. 3, 1952).

Mr. Sewell, the petitioner, was allowed to testify to the effect that many customers appeared with doctors' prescriptions (II. R. 303-304). Petitioner's attorney stated this verbal testimony would cover all that was offered to be proved by the exhibits (II. R. 290). The offer of proof having been restricted to the fact that customers appeared with prescriptions for Cuboids, the contents or form of the prescriptions not having been in issue, the admission into evidence of the prescriptions themselves would have added nothing to Mr. Sewell's testimony that many sales were made on prescriptions.

3. Refusal to admit the testimonials into evidence was not error

Petitioner here contends that the examiner committed error in refusing to admit into evidence certain testimonials of users of his product. On appeal to the Commission from the initial decision of the examiner this issue was raised and argued. The Commission sustained the action of this examiner.

A short reply to petitioner's contention here is that testimonials of this nature are hearsay and have no probative value (*United States v. 50³/₄ Dozen Bottles*, 54 Fed. Supp. 759, 763 (D. C. Mo., 1944)).

4. Refusal by the hearing examiner to reopen the defense to receive the testimony of Dr. Glassman was not error

Petitioner contends that the examiner committed error in refusing to grant petitioner's request to reopen his defense to enable him to introduce the testimony of Dr. Glassman. When the examiner denied petitioner's request, petitioner submitted an offer of proof (I. R. 77-82). On appeal to the Commission from the initial decision of the examiner, petitioner raised and argued the issue. The Commission sustained the examiner's refusal to reopen and stated in so doing it had considered the matter set forth in petitioner's offer of proof to the same extent as though Dr. Glassman had testified (I. R. 168). In its final determination of the matter on its merits the Commission gave full consideration to petitioner's offer of proof (I. R. 168, 175-176).

The issue here is not properly before the Court, and, since the Commission gave full consideration to the matters in petitioner's offer of proof, the question here raised is moot.

5. Refusal to strike the 58 specified portions of testimony was not error

At the hearing below petitioner filed a motion before the examiner to strike from the record 58 specified portions of opinion testimony given by qualified medical experts. The grounds for petitioner's motion were that since he had not been permitted to ask questions of a similar nature of his witnesses, then specified opinions given by the Commission's witnesses should be stricken. The examiner denied petitioner's motion.

On appeal to the Commission the examiner's ruling was sustained.

There is no merit for petitioner's contention here. An examination of the pertinent portions of the record (II. R. 250-251, 255-256) clearly reveals the nature of questions asked by petitioner and the reason why he was not permitted to ask those questions.

Petitioner's questions were as to the truth or falsity of the advertising statements in issue. The hearing examiner explained to petitioner that the experts could be asked their opinions as to what the device in question would do, but not their opinions as to the truth or falsity of an advertising statement; that the truth or falsity of his representations as to his product was a matter for the ultimate decision of the Commission and not a matter to be directly testified to (II. R. 255-256).

Petitioner expressed his understanding of the distinction between the two types of questions and proceeded to elicit proper opinion testimony from the witness (II. R. 256-257). Not one of the questions and answers covered by petitioner's motions to strike was directed to the truth or falsity of petitioner's advertisements.

D. Petitioner was afforded a fair trial

Petitioner contends that he was denied a fair trial by reason of (a) the administrative system of the Federal Trade Commission, and (b) the attitude and rulings of the examiner. In developing this contention petitioner wanders far afield.

He contends that the Commission has acted as complainant-prosecutor and judge, has influenced the examiner by its complaint, that the examiner has influenced the Commission by his initial decision, and that the Commission has interpreted in its favor the advertisements which it complained of as being false and misleading, all of which, so says petitioner, has resulted in denying him a fair trial.

Petitioner's entire argument (Br., pp. 19-31) is devoid of merit. An answer, if any is necessary, is that as long ago as 1920 the contention that the Federal Trade Commission Act was unconstitutional because of the dual function required of the Commission was rejected by the courts. In *National Harness Mfrs.' Ass'n v. Federal Trade Commission*, 268 Fed.

705, 707 (1920), the Sixth Circuit observed that such contention "is too unsubstantial to justify discussion." The Supreme Court in *Federal Trade Commission v. Klesner*, 280 U. S. 19, 27 (1929), recognized the necessity of the Commission functioning in a dual capacity, observing that the Commission "exercises functions of both prosecutor and judge."

Further than this, petitioner fails to point out in what way and in what manner the examiner's attitude and rulings were of such a nature as to deprive him of a fair trial. Without a proper showing of this, petitioner's contention raises no issue here.

IV. CONCLUSION

The Commission therefore prays that the petition to review be dismissed, and that pursuant to the statute²⁰ the Court enter its decree affirming the Commission's order to cease and desist and commanding petitioner to obey the same and comply therewith.

Respectfully submitted.

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Attorney,

Attorneys for the Federal Trade Commission.

Washington, D. C.

June 1955.

²⁰ "To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Sec. 5 (c), 52 Stat. 113, 15 U. S. C. 45 (c).

APPENDIX

PERTINENT PROVISION OF THE FEDERAL TRADE COMMISSION ACT:

SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce (66 Stat. 632; 15 U. S. C. 45 (a)).

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. * * * (52 Stat. 112; 15 U. S. C. 45 (b)).

(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. (52 Stat. 113; 15 U. S. C. 45 (c).)

SEC. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5 (52 Stat. 114–115; 15 U. S. C. 52).

SEC. 15. * * * (a) The term “false advertisement” means an advertisement, other than labeling, which is misleading in a material respect; * * *. (52 Stat. 116; 15 U. S. C. 55 (a).)

* * * * *

(d) The term “device” * * * means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals (52 Stat. 116; 15 U. S. C. 55 (d)).

SUMMARY OF QUALIFICATIONS OF COMMISSION'S EXPERTS

Dr. Otto Anderson Engh

Dr. Engh, orthopedic specialist for 15 years, is chief of staff of the Anderson Orthopedic Clinic and chief orthopedist of

several hospitals in the Washington, D. C., area; chief consultant in orthopedics for the United States Public Health Service in the Washington, D. C., area; faculty member of George Washington University Medical School for 10 years; member of the American Medical Association, American Academy of Orthopedic Surgeons; president of the Virginia Orthopedic Society; and diplomat of the American Board of Orthopedic Surgery. He sees approximately 100 foot cases each week (II. R. 11-18) and has seen a couple of hundred patients who wore petitioner's device (II. R. 37).

Dr. James Hugh Masterson

Dr. Masterson, medical doctor, is an orthopedic specialist, having spent three years at that specialty in the Army, followed by private practice including three years' orthopedic work at the Anderson Orthopedic Clinic and at his private office, and is connected with various hospitals in the Washington, D. C., area. This doctor has seen over 100 patients wearing petitioner's device (II. R. 63-67).

Dr. Roscoe S. Mosiman

Dr. Mosiman, orthopedic surgeon, taught orthopedic surgery at Tulane University for two years and has addressed the American Academy of Orthopedic Surgeons and the American College of Surgeons. Dr. Mosiman served an orthopedic internship at Johns Hopkins Hospital at Baltimore, Maryland, and was chief of section of an orthopedic hospital in the Army, after which he returned to Johns Hopkins Hospital as an orthopedist (II. R. 104-107).

Dr. Philip Lewin

Dr. Lewin, an active orthopedic surgeon since 1915, has done extensive post-graduate work in orthopedics in this country and abroad. He is Professor of Bone and Joint Surgery and chairman of the Department of Bone and Joint Surgery at Northwestern Medical School in Chicago, and Professor of Orthopedic Surgery at the Post Graduate Medical School of Cook County.

He is a diplomat on the American Board of Orthopedic Surgery; a fellow in the American College of Surgeons, the Interna-

tional College of Surgeons, and the American Medical Association; and a member of the Clinical Orthopedic Society, the American Academy of Orthopedic Surgery, and the American Orthopedic Society, among others. He has received signal honors from numerous medical associations.

He has been a contributor to many standard medical works and is the author of numerous publications and books in the field of orthopedics, including current editions of the book "Foot and Ankle" (IV. R. 818-827).